

**REMARKS/ARGUMENTS**

**Tongue depressor dimensions are standard; popsicle sticks do not function as tongue depressors**

Claim 1 was rejected under 35 USC 102(b) as being anticipated by Esker et al (5,946,773). The claim has been amended to specify that the tongue depressor is the standard size (page 7, line 21) used with youthful patients, and that the tongue depressor does not have a protective layer. Applicant requests reconsideration of the rejections based on the following:

Tongue depressors are used for oral examinations, during which the primary purpose of the tongue depressor is to hold the patient's tongue down enough for the doctor to get a good view of the oral cavity/tonsils (page 1, lines 24-25). The dimensions of the tongue depressor are therefore related to the size of the patient's mouth, tongue and the distance between the tonsils. For example, a tongue depressor designed for infants would be substantially smaller than that for adults or children, since the tongue is very small and a narrower stick would successfully hold down the majority of the tongue to produce a clear view of the tonsils. As the patient gets older and the tongue gets larger, the width of the tongue depressor must increase to enable the doctor to successfully depress a large enough portion of the tongue so it does not visually obstruct the tonsils.

In addition to being wide enough to hold the patient's tongue down sufficiently, the tongue depressor also needs to be (1) long enough to provide a comfortable distance between the doctor's hand and the mouth, and (2) flexible enough such that some give occurs when the doctor presses down on the end of the tongue depressor (both ensure that the doctor's own hand does not obstruct his vision into the mouth). These three elements are inherent to a functioning tongue depressor.

There are four standard sizes of tongue depressors in the United States, one of which is designed specifically for use with youthful patients. This size is appropriately called "junior" and has dimensions of 5 1/2" long by 5/8" wide. This name (Junior), and

its corresponding dimensions, is a well-known standard in the medical community. In fact, all manufacturers and distributors that sell this product, use the same name and dimensions in the product description in their catalogs or other sales material. Similarly, tongue depressors designed specifically for use with adults, seniors and infants also have standard names and dimensions.

The disclosure specifically states that the tongue depressors in the invention are specifically for use with youthful patients (page 1, line 5). Their primary function is to be attractive and thereby distract children away from their fears, thus making the medical examination easier for doctors to administer. In addition, they are described as serving the following purposes: (1) empower young patients by allowing them to choose which tongue depressor the doctor will use, (2) give the young patients a sense of control in an event that is otherwise entirely out of their control, (3) add fun, interactivity and relationship building to the examination process, and (4) serve as a reward to the children for their cooperation (page 6, lines 22-30).

Based on the description in the disclosure, one of ordinary skill in the field would understand that patients who would benefit from these tongue depressors would be younger than an adult (who would be mature enough to withstand the examination without fear and who would be too old to be motivated by a decorated stick) and older than an infant (who would be too young to appreciate the decorated stick and also too young to associate the tongue depressor with fear). Since the tongue depressors described would be used with children, they would therefore be the standard Junior size, with the corresponding dimensions. This size, 5 1/2" long by 5/8", is different and substantially longer, wider and thinner than an ordinary popsicle stick.

Popsicle sticks are designed to withstand the weight of an ice-cream or other frozen novelty on one end. In order to serve this function, popsicle sticks are generally shorter, narrower and/or thicker than tongue depressors. Based on this, it would be clear to one of ordinary skill in the medical field that popsicle sticks would not function properly as tongue depressors for young children. The popsicle sticks' dimensions would

prevent the sticks from functioning appropriately. Specifically, the popsicle sticks would be too narrow to successfully depress the child's tongue, too short to provide a comfortable distance between the doctor's hand and the patient's mouth, and too stiff to provide adequate flexibility. Since a popsicle stick could not be a suitable tongue depressor, the prior art described in Esker et al would not be obvious as relating to a tongue depressor. Applicant therefore requests reconsideration of the rejection.

Applicant has attached a declaration by Doctor Deepti Mehrotra supporting this subject matter.

**Ornamental image has utilitarian function**

Independent Claim #17 was added. The purpose of this claim is to maintain that the ornamental image described in the disclosure is more than just decoration, but rather has intrinsic function. Specifically, the following were added referring to the ornamental image: (1) the image covers the entire surface of the tongue depressor (page 8, line 9); (2) the image appeals to children (page 7, line 29); and (3) the image consists of at least two colors (page 8, line 10). These three claims are critical to the invention because they ensure the invention will function as intended and get the desired results.

The object of the decorated tongue depressor is to distract children during medical examinations to the extent that they will forget their fears and allow the doctor to perform the examination more quickly and easily. Since the ornamental image is designed to specifically accomplish this goal, it needs to call-out to the children in a way that successfully attracts and holds their attention. The bright colors and child-appealing image covering the full length of the stick together are able to accomplish this goal (page 1, lines 7-11). A plain, uncolorful stick, image covering only a small portion of the stick, or a design with little or no appeal to children, would make the tongue depressor less attractive to children and would not be appealing enough to provide the intended distraction.

Therefore, the ornamental feature of the tongue depressor has utilitarian function, and is not simply a decorative feature. If one of the aspects of the ornamental image is taken away, the tongue depressor would not function as well and would not produce the intended result.

Applicant has attached a declaration by Doctor Deepti Mehrotra supporting this subject matter.

CONCLUSION

Applicant has amended the claims to provide allowable subject matter. If examiner believes useful, applicant invites examiner to please call to further discuss the proposed amendments.

Respectfully submitted,



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Attachments

**Declaration of Deepti Mehrotra, MD in support of Application No. 10/617,935**

I am a pediatrician currently in private practice in Port Washington, New York. I completed my pediatric residency at Schneider Children's Hospital in New Hyde Park, New York and have been practicing pediatric medicine for the past five years.

I have no personal interest or investment in Silver Consumer Products Corporation, nor am I a relative of the inventors, Catherine and Peter Drogin.

As a practicing pediatrician, I use a tongue depressor on almost every patient that I see. In addition, I am very familiar with the proposed invention, as I currently use the product in my practice.

In my office, I use the standard "junior" size tongue depressors when conducting oral examinations on children. It is my strong belief that a popsicle stick would not be suitable for use as a tongue depressor because the dimensions are wrong. Popsicle sticks are generally narrower, shorter and thicker than the tongue depressors used on children. Specifically, a popsicle stick (1) would be too narrow to depress a child's tongue sufficiently to provide a clear view of the tonsils, (2) would not have the flexibility to comfortably push down on the end that is not inside the mouth, and (3) would be too short, making it more difficult to hold the tongue depressor at a comfortable distance from the mouth. I believe that it would be clear to anyone of ordinary knowledge in the medical field that popsicle sticks would not be considered suitable tongue depressors for use on children.

Attached are pages from the online catalog of a leading medical products distributor. As you can see, while there are different manufacturers of tongue depressors (also called tongue blades), all offer the same standard sizes for infants ("infant"), adults ("Regular/Reg"), seniors ("Standard/Std") and children ("Junior/Jr"). Please note that the children's size is "Junior".

I currently use the decorated tongue depressors with my patients and am pleased with the results. Since the images are colorful, child-oriented, and cover the entire side of

Appl. No. 10/617,935  
Amdt. dated October 11, 2004  
Reply to Office action of July 25, 2004

the tongue depressor, the children are immediately interested and attracted to the sticks. They spend time choosing the tongue depressor and discussing the image with me, and they usually ask to keep the tongue depressor when the oral exam is completed. I believe that if the images were not multi-colored, not child-oriented and did not cover the majority of the stick, they would not be as attractive to the children and would not work as well.

Signed,

A handwritten signature in cursive script that reads "Deepti Mehrotra MD".

Deepti Mehrotra, MD  
Pediatrician  
Port Washington, NY

Date 10/7/04.



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Attachment to Declaration by Deepthi Mehrotra, MD (pg. 1 of 2)

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PSS # Item

Vendor # Vendor

27979 Tongue Blade Junior Plain Non Sterile Wooden 5 1/2" x 5/8" 500/Bx 10Bx/Cs 22-9926 PSS Select

9558 Tongue Blade Junior Plain Sterile Wooden 5 1/2" x 5/8" 100/Bx 10Bx/Cs 22-9999 PSS Select

23309 Tongue Blade Regular Non Sterile Wooden 6" x 3/4" 500/Bx 10Bx/Cs 22-9925 PSS Select

10018 Tongue Blade Regular Sterile Wooden 6" x 3/4" 100/Bx 10Bx/Cs 22-9998 PSS Select

21322 Jar Tongue Blade Comp 512SS-7X4.25" 3458 Waremedic

1634 Jar Tongue Blade Unlabeled with Cover 7" x 4 1/4" Set of 6 3458 Graham Field

23667 Jar Tongue Blade W/O Lid/Lab 3458J Graham Field

35956 Tongue Blade 706 Hardwood Products

132029 Tongue Blade Adult Ns 500bx 320 ATLANTIC SALES AND SERVICE

35348 Tongue Blade Attachment 3.5v 28100 Welch Allyn

19703 Tongue Blade Cherry 38100 Solon

19704 Tongue Blade Grape 38200 Solon

60488 TONGUE BLADE HOLDER 2.5V 28000 Welch Allyn

45673 Tongue Blade Infant 22-9627 Citmed

9273 Tongue Blade Infant Ns 700 Hardwood Products

57098 Tongue Blade Infant St 25-700 Hardwood Products

25918 Tongue Blade Jr Ns 22-9926 Citmed

5947 Tongue Blade Jr St 25-711 Hardwood Products

9907 Tongue Blade Junior Cherry Non Sterile Wooden 5 1/2" x 5/8" 50/Bx 20Bx/Cs 710 CHERRY

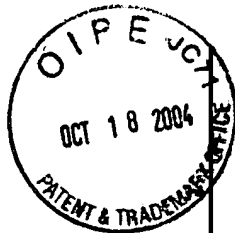
9915 Tongue Blade Junior Grape Non Sterile Wooden 5 1/2" x 5/8" 50/Bx 20Bx/Cs 710 GRAPE



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5505	Tongue Blade Junior Plain Non Sterile Wooden 5 1/2" x 5/8" 500/Bx 10Bx/Cs	711	Hardwood Products
5946	Tongue Blade Reg St	25-705	Hardwood Products
5504	Tongue Blade Regular Non Sterile Wooden 6" x 3/4" 500/Bx 10Bx/Cs	705	Hardwood Products
87309	Tongue Blade Sr 6" Ns 500bx	C15063-006	Allegiance
60289	Tongue Blade Sr Ns	22-9598	Citmed
4801	Tongue Blade Sr Ns	22-9925	Citmed
28630	Tongue Blade Sr St	36900	Solon
3378	Tongue Blade Standard Non Sterile Wooden 6" x 11/16" 500/Bx 10Bx/Cs	704	Hardwood Products
15908	Tongue Blade Strawberry	710	Hardwood Products
4255	Tongue Blade Wrapped	STRAWBERRY 710	Hardwood Products
29962	Tongue Blade Wrapped Jr Ns	22-9629	Citmed
29959	Tongue Blade Wrapped Sr Ns	22-9628	Citmed
9320	Tongue Blade Wrapped Std	709	Hardwood Products

Attachment to Declaration by Deepti Mehotra, MD (page 2 of 2)